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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WAYNE TRUVOLL EVANS, Defendant and Appellant.	D059607 (Super. Ct. No. SCD228168)

APPEAL from a judgment of the Superior Court of San Diego County, Laura H. Parsky, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, III and IV.

INTRODUCTION

A jury convicted Wayne Truvoll Evans of one count of unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a); count 1), three counts of receiving stolen property (Pen. Code,[2] § 496d; counts 2, 4 & 6), one count of grand theft of personal property (§ 487, subd. (a); count 7), one count of vandalism over $400 (§ 594, subds. (a) & (b)(1); count 8), and one count of conspiracy (§ 182, subd. (a)(1); count 9). The jury also found true allegations the victims' aggregate losses exceeded $65,000 (§ 12022.6, subd. (a)(1)) and $200,000 (§ 12022.6, subd. (a)(2)). The trial court granted Evans's motion for acquittal under section 1118.1 as to two other counts of unlawfully taking a vehicle (counts 3 and 5) and an allegation the value of the stolen property exceeded $100,000 (§ 1203.045, subd. (a)). In addition, the trial court dismissed the receiving stolen property convictions under section 1385. The trial court sentenced Evans to an aggregate term of six years in prison.

Evans appeals, contending we must reverse his convictions because the trial court denied his motion for a mistrial after the jury initially received a transcript of an audiotaped police interview of Evans, which mistakenly included a detective's comment that Evans had previously been to prison. Evans additionally contends we must reverse his convictions because they were based on a legally impossible conspiracy theory and may have been based on the commission of overt acts occurring after completion of the target crime. He alternatively contends we must reverse his convictions for counts 1 and

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2 Further statutory references are also to the Penal Code unless otherwise stated.

7 because these offenses were not natural and probable consequences of the conspiracy. He also contends we must reverse his convictions because there was insufficient evidence to support his participation in the conspiracy. Finally, he contends we must reverse the true finding on the section 12022.6, subdivision (a)(2), enhancement because there is insufficient evidence the victims' properly calculated aggregate losses exceeded $200,000. We conclude each of Evans's contentions is meritless and affirm the judgment.

BACKGROUND

In April 2010[3] several companies stored trucks, excavators and other heavy equipment at a trucking company's facility in Vista, California. Barton Dixon stored his excavator and its attached hydraulic breaker there. Joseph Mattos stored his red truck and trailer there. All four items were at the facility the afternoon of April 11. The next morning, all four items were gone and a gate not normally used by the trucking company was lying down in the driveway.

The gate had red paint on it at a height corresponding to the trailer. There were tracks in the dirt leading from where the excavator had been stored to a few feet from where the truck and trailer had been stored. A person could operate the excavator with a universal key, but could not move it any great distance without a trailer because of its low maximum speed.

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3 All other background events occurred in 2010 unless otherwise stated.

Around noon five days earlier, on April 7, Jeffrey Roberts, who lived in Los Angeles, approached Deborah Ennis, one of the trucking company's employees, inquiring about a job with Mattos's company. Mattos's company name appeared prominently on Mattos's trailer, which was parked near the trucking company's front gate. Ennis spoke with Roberts for about five minutes. During the conversation, Ennis saw a car parked at the bottom of the stairs leading to her office. There was an African-American or Hispanic man seated in the car. The car resembled the one Evans had rented approximately a week earlier.

Cell phone records showed calls were made from Roberts's cell phone between 11:30 a.m. and 3:07 p.m. that day using cell towers near the trucking company. Between 12:13 p.m. and 2:52 p.m. calls were made from Roberts's cell phone using cell towers located near Evans's home in Encinitas. Six calls were made between Roberts and Evans's cell phones that morning, the last of which was at 10:57 a.m. One call was made from Evans's cell phone to Roberts's cell phone at 5:30 p.m. that afternoon.

Between 9:36 p.m. on April 11, the day the truck, trailer, and excavator were last seen, and 2:30 a.m. on April 12, the day the truck, trailer, and excavator were discovered missing, at least 61 calls were exchanged between Roberts's cell phone and Evans's cell phone. At 7:39 p.m., Roberts's cell phone used a cell tower in the Anaheim area. Around 9:14 p.m., Roberts's cell phone used cell towers located near Evans's home. Between 9:46 p.m. and 11:50 p.m. and between 12:02 a.m. and 12:21 a.m. the following morning, Roberts's cell phone used cell towers located near the trucking company. Between

midnight and 1:59 a.m., Roberts's cell phone used towers along northbound Interstate 15, including a cell tower near the Pala Indian Reservation between 1:24 a.m. and 1:59 a.m.

There are two routes truckers can take to avoid the weigh stations on Interstates 5 and 15, where drivers may be requested to show permits, driver's licenses and medical cards. Of the two routes, the shortest and easiest to travel is through Pala.

Sometime in April, Roberts asked Chakula Baskom[4] for permission to store the excavator in Baskom's backyard in Los Angeles for a week or two. Baskom agreed. Baskom later saw Roberts and a man named "Cricket" pull the excavator off the truck and trailer, which were parked in the alley by Baskom's house. Roberts then drove the excavator into Baskom's backyard.

Sometime in April or May, Evans called Arthur Turner,[5] a truck driver, and offered Turner $1,000 to come to Los Angeles and drive a truck for him. Turner declined the offer.

Four days after the thefts, on April 16, a male left a voicemail message for Mattos's company asking about employment. Four days after that, on April 20, Mattos received the first in a series of 39 to 40 phone calls and voicemail messages from Evans. During the first call, Evans told Mattos he had seen Mattos's truck in northern Los Angeles and asked the driver about employment. Evans said he knew the truck belonged

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4 Baskom had two prior convictions for burglary and a prior conviction for possession of a controlled substance. He testified under a grant of immunity.

5 Turner had prior convictions for second degree burglary, grand theft, false imprisonment, extortion, and domestic violence. He testified under a grant of immunity.

to Mattos because Mattos's company's name was on the door of the truck. Mattos told Evans the truck had been stolen along with a trailer and an excavator.

On April 23 Evans called Mattos and told Mattos he knew the location of the excavator and would provide the location for $6,500. Mattos said he would pass the information to the owner of the excavator. Ten minutes later, Evans called Mattos and asked for the excavator's serial number. Mattos did not know the serial number, but provided Evans with the model number.

On April 27 Evans called Mattos and asked if Mattos had heard from the excavator's owner, as the owner had not called Evans. About 10 minutes later, Evans called Mattos again. He asked for the license plate numbers of the truck and trailer. He also asked whether there was a reward for the return of them. Mattos told Evans there was a $1,000 reward for each. Evans said he wanted more reward money. He explained he understood Mattos's pain because someone had stolen his excavator 10 years earlier. He assured Mattos that if he saw Mattos's truck and trailer, he would take them and give them back to Mattos.

On May 18 Evans called Mattos and told Mattos he would provide the location of the truck and trailer if Mattos gave him $3,000. On May 20 Mattos told Evans he would not have the money until the insurance company paid him and he needed proof Evans knew the location of the truck before he gave Evans the money. He asked for a picture of the truck or to meet at the truck's location.

The next day, Evans called Mattos and told him he could not get a picture because his cell phone did not have a camera and he could not get close enough, as there were two

pit bulls in the yard with the truck and trailer. Mattos told Evans he would not meet him or give him any money without a picture.

At some point, Mattos spoke with officers from the Regional Auto Theft Task Force (task force) and agreed to let an officer act on his behalf with Evans. Mattos and Evans subsequently set up a meeting for May 26. Evans told Mattos that, once Mattos gave him $3,000, he would leave in his car, make a phone call, then call Mattos back or have Mattos follow him to the location of the truck and trailer.

At 6:13 p.m. on May 26, California Highway Patrol Officers John Jiacoma and John Clements, who were working undercover for the task force, met with Evans at a restaurant in Orange County. Jiacoma met with Evans first. Jiacoma pretended to be Mattos's brother and claimed Mattos sent him to meet with Evans. He said Mattos had told him Evans had Mattos's truck and trailer and he was supposed to pay Evans. Evans said he did not know the location of the truck and trailer. Jiacoma said he would not give Evans the money until Evans took him to their location. Evans again said he did not know their location. Rather, he knew who did and this person would provide the location once Evans had the money. Evans claimed he had seen the truck in the San Fernando Valley and eventually contacted Mattos, who told him the truck was stolen.

At this point, Clements joined the meeting. Jiacoma introduced Clements as his son. Clements asked if they were getting the truck and trailer back. Jiacoma responded that Evans did not know their location. Evans said he had seen the truck in the San Fernando Valley and his friend told him there were a couple of pit bulls at the location where the truck and trailer were stored. Clements showed Evans a wad of cash and

Jiacoma said, "If I give you the roll [], I'd never see you again. And that's the thing." Evans said he understood.

During the meeting, Evans received a phone call. Evans told the caller, "I'm in the middle of a conversation[.] I'll call you back in 20 minutes man." When the officers commented that $3,000 was a lot of money for them, Evans replied that he had lost an excavator about five years earlier. Evans claimed the man he knew would meet with him if Evans had the cash. Clements responded, "The cash stays in my pocket. Alright cut our losses."

After the meeting, police officers took Evans into custody, provided him the advisements required by *Miranda v. Arizona* (1966) 384 U.S 436 (*Miranda* advisements), and interviewed him. In the interview, Evans stated he understood his rights and insisted the officers did not have a case against him.

Evans repeated his claims about seeing Mattos's truck in the Los Angeles area, eventually contacting Mattos inquiring about job openings, and learning from Mattos the truck had been stolen. Mattos gave him the truck's license plate number and he told Mattos he would call Mattos if he saw the truck. Mattos offered him a reward of $1,500 each for the return of the truck and the trailer. Mattos also gave him the excavator's serial number and said the reward for its return was $1,000.

Evans told Mattos he had seen an excavator in someone's backyard, but it did not have a breaker attached to it and was not the stolen one. Evans asked Mattos if Mattos thought the theft was an inside job and Mattos "like brushed it off." Evans claimed he previously had an excavator stolen from a yard and a rig stolen off the freeway. He said

he assured Mattos that if he knew where Mattos's truck and trailer were, he would get them for him.

Mattos asked for a picture of the truck and trailer. Evans relayed the request to a man he knew. The man told Evans there were two pit bulls in the yard with the truck and trailer. Evans said the man was going to pay Evans $500 out of the $3,000 reward for the truck and trailer. Evans hoped Mattos would give him additional reward money.

During the interview, Evans received a call on his cell phone from Roberts's cell phone. Evans's cell phone contained Roberts's photograph. After the interview, the detective informed Evans he was under arrest. Evans responded that Mattos "would never see his equipment again" and Evans "was going to f—k his s—t up."

On July 1 task force member, El Cajon Police Detective Michael Doyle rearrested Evans, gave him *Miranda* advisements, and interviewed him. During the interview, Evans admitted he had a commercial driver's license and used to move heavy equipment. He also admitted he was in Pala late in the evening on April 11 and early the following morning. When Doyle asked, "Who's Jeffrey Roberts?" Evans responded, "I don't know and I don't give a f—k." Evans later acknowledged knowing Roberts. He also acknowledged asking for $6,500 for the return of the excavator. Evans claimed Mattos told him they would split the reward money. Evans said it would be ludicrous to sell Mattos's truck for $3,000 because the tires were worth $3,000, the motor was worth $10,000, and the hood was worth $4,000.

Evans denied being at the trucking company at the time of the thefts or having anything to do with the truck's theft. When Doyle suggested Roberts was involved,

Evans said the theft was not Roberts's "m.o." When Doyle accused Evans and Roberts of talking on the phone at least 60 times on April 11 in the area of the trucking company, Evans said he did not believe they had talked that many times and, if they had, Evans must have just been hanging up quickly. Evans also claimed he did not remember talking with Roberts that night.

Doyle asked Evans what Evans and Roberts were doing together on April 11. Evans said, if they were together, they would have been selling drugs. Doyle pointed out that if Evans drove from his home in Encinitas to his girlfriend's home in Vista along Sycamore Drive, Evans would pass right by the trucking company and, therefore, would know of it and its location. Evans claimed he drove a different route to his girlfriend's home. Evans told Doyle that, if Doyle reduced his bail, he would post a bond and take Doyle directly to the truck and trailer. He said they were at a residence in the Los Angeles area with two pit bulls.

On September 2 Doyle called Baskom and asked about the excavator. Baskom said the excavator was still in his backyard. Doyle met with Baskom at Baskom's home on September 7. Dixon's excavator and breaker were in Baskom's backyard. Baskom drew Doyle a map showing the approximate location of the truck and trailer. With the assistance of a helicopter, Doyle located them. Roberts lived about 15 to 20 minutes by car from their location.

Mattos's received the truck and trailer back on September 7. The truck was in good condition, except the batteries and ignition switch were missing and the driver's side

door window was broken. A radio and safety gear were also missing from inside the truck.

The trucking company paid $2,000 to replace its broken gate. An expert testified the fair market value of the truck was $60,000 and Mattos testified it would sell for between $65,000 and $70,000 at an auction. Another expert testified the fair market value of the trailer was between $72,000 and $75,000. Mattos estimated he lost $37,600 in business while his truck and trailer were missing. One of his main clients paid $38,618.83 to another business that he would have paid to Mattos during this time frame.

A third expert testified the fair market value of Dixon's excavator without the attached breaker was $50,000, and it would sell for $40,000 at an auction. The expert did not have an opinion on the value of the breaker. Dixon repurchased the excavator and breaker from his insurance company for $46,000 plus $1,710 in impound and towing fees. Before offering to repurchase the items, Dixon searched six auction websites. The most expensive excavators he found, which likely did not have attached breakers, were $43,000. He based the amount of his $46,000 offer on the inclusion of the attached breaker.

DISCUSSION

I

Denial of Mistrial Motion

A

Before trial, the parties agreed to redact portions of the audio recording of Evans's first custodial interview, including the following comments by a detective: "Do you

know, I mean, here's the thing. If you, you've been around this stuff a long time and you've done this equipment. You know that, that whole, that whole side of the business. You also have been to prison. You know that whole side of the business." Although the prosecutor redacted these comments from the audio recording, the prosecutor failed to redact them from the copies of the transcript distributed to the jury when the prosecutor played the audio recording in court.

Just before the audio recording reached the portion of the interview where the detective made the comments, the prosecutor asked to stop the proceedings. During a subsequent sidebar conference, counsel advised the trial court the transcript included the detective's comments; however, the audio recording was stopped four lines before that point in the interview. Defense counsel moved for a mistrial because the jury had the opportunity to read the offending portion of the transcript.

The trial court collected the jury's copies of the transcript and sent the jury out on a break. After discussing the matter further with counsel, the trial court decided to question the jurors individually to determine whether any had read ahead in the transcript. Six jurors and one alternate stated they had not read ahead or discussed with other jurors anything further ahead in the transcript. One juror did not remember reading past the stopping point and had not discussed with any other juror anything in the transcript beyond the stopping point.

Two jurors had read a page ahead and one juror had read a paragraph ahead, but they did not remember what they had read. One of the alternates had read, at most, one or two lines past the stopping point. None of these four jurors had discussed what they

had read with the other jurors and none thought what they read would preclude them from being fair and impartial jurors. All of them indicated they could disregard what they had read ahead.

One juror had read ahead, remembered what he had read, and had not discussed what he had read with the other jurors. He said he would try to disregard anything he had read past the stopping point, but was not "a hundred percent" certain he could do so. He also said he would have difficulty following a limiting instruction requiring him to base his decision on the evidence actually received and to disregard what he had read in the transcript.

Another juror read ahead, appeared to the trial court to have remembered what he had read, but did not discuss what he had read with the other jurors. He said he would not have any difficulty disregarding what he had read ahead and could base his decision solely on the evidence properly received, not the transcript. He also said nothing he read would prevent him from being a fair and impartial juror. He agreed not to discuss anything he had read past the stopping point with his fellow jurors.

After questioning the jurors and listening to the parties' arguments, the trial court decided to excuse the two jurors who had read ahead and remembered what they read. The trial court explained, "The other jurors who read ahead stated they couldn't remember what they read, so there's no indication that that could affect the fairness of the trial or their deliberations." The court also noted the alternate who had read ahead, "stated that he didn't read more than one or two lines past where we stopped and this information was past one or two lines." The trial court then indicated it was denying the

mistrial motion because, in its view, excusing the two jurors who had read ahead and remembered what they read cured any possible prejudice.

When the trial resumed, the trial court admonished the jury, "[T]ranscripts are only assistive devices for you to help you as you hear the evidence, which is the recording. [¶] So if there are inconsistencies between the transcripts and the recording, it's the recording that is the evidence, not the transcript. And so you're to consider those transcripts only to assist you as you hear the recording. [¶] And as I stated in the beginning, the only thing that the jury is to base the decision on is the evidence that's properly admitted during the trial."

The trial court further instructed the jury, "You are only to consider the defendant's statements for the truth of any matter that he makes a statement about. The questioners or the interviewers who ask him questions, you are not to consider any of the content in their questions for the truth of what's in their statements. Their statements are only relevant to the extent that they have an effect on the listener, in this case, the person being interviewed, the defendant, and to the extent they may give context to his answers. But you are not to consider the interviewer's statements for the truth of those statements."

B

Evans contends we must reverse his convictions because the trial court erred in denying his mistrial motion. "A trial court should grant a motion for mistrial 'only when " 'a party's chances of receiving a fair trial have been irreparably damaged' " ' [citation], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' [citation]. 'Whether a particular incident is incurably prejudicial is by its nature a

speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion." (*People v. Avila* (2006) 38 Cal.4th 491, 573; accord, *People v. Dement* (2011) 53 Cal.4th 1, 39-40.)

In this case, none of the jurors heard the offending remarks on the audio recording as the audio recording was properly redacted. The trial court questioned each juror individually and excused the only two jurors who had both read beyond the stopping point and remembered what they had read. Of the remaining jurors, only four had read the transcript past the stopping point. One of the four had not reached the objectionable comments and the other three could not remember what they had read. All four jurors assured the court they could disregard what they had read ahead.

Evans argues the jurors probably did not accurately know or indicate to the trial court how far ahead they had read and, despite their contrary representations, probably were unable to forget what they might have read ahead. However, this argument amounts to a challenge to the trial court's factual findings and ignores our general obligation as a reviewing court to defer to such findings when, as here, they are supported by substantial evidence. (*People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681 [appellate courts review trial courts' findings of fact under deferential substantial evidence standard].)

Moreover, the trial court did not rely solely on its inquiry of the jury to cure the possible prejudice to Evans. The trial court also instructed the jury the transcript was not evidence and only Evans's responses, not the content of the questions asked of him, could be considered for the truth of the matter asserted. We presume the jury followed these

instructions. (*People v. Avila*, *supra*, 38 Cal.4th at p. 574.) Evans has not rebutted this presumption. His assertions that, despite the jurors' assurances and the trial court's instructions, some of the jurors may have read, remembered, been unable to disregard, and misused the improper part of the transcript to convict him based on his perceived character rather than his conduct are speculative. Moreover, his assertions are undercut by the length (eight hours over three days) and care (multiple requests for the read back and replaying of evidence) of the jury's deliberations. Accordingly, we conclude Evans has not established the trial court abused its discretion in denying his motion for a mistrial.

II

Conspiracy Theory and Coconspirator Culpability

A

Counts 1, 3 and 5 of the amended information each charged Evans with unlawfully taking a vehicle under Vehicle Code section 10851, subdivision (a). Count 1 related to the theft of the truck, count 3 related to the theft of the trailer, and count 5 related to the theft of the excavator. At the close of evidence, the trial court dismissed counts 3 and 5 under section 1118.1, finding the prosecutor had not established that the excavator was a vehicle or that the trailer was a separate vehicle from the truck for purposes of Vehicle Code section 10851, subdivision (a). The truck combined with the attached trailer then became the basis for count 1.

Count 9 of the amended information charged Evans with conspiracy to commit the crime of unlawfully taking a vehicle. The trial court instructed the jury that the

conspiracy charge required the prosecutor to prove: (1) Evans intended to agree and agreed with Roberts to commit the crime of unlawfully taking a vehicle, (2) at the time of the agreement Evans and the other alleged conspiracy members intended for one or more of them to commit the crime of unlawfully taking a vehicle, and (3) Evans or Roberts or both committed at least one specified overt act in California to accomplish the crime. The specified overt acts were:

> "On or about April 7th, 2010, [Roberts] went to [the trucking company's storage lot];
>
> "On or about April 11th, 2010, [Roberts] traveled from Los Angeles County to San Diego County;
>
> "On or about April 11th, 2010, the defendant and [Roberts] spoke on the [telephone together];
>
> "On or about April 11th, 2010, the defendant and [Roberts] traveled to [the city where the trucking company was located];
>
> "On or about April 11, 2010, the defendant and [Roberts] traveled to the Pala and Temecula area of San Diego County and Riverside County, respectively;
>
> "On or about April 11th, 2010, [Roberts] traveled from San Diego County to Los Angeles County;
>
> "Around April 2010, [Roberts] delivered the [excavator to Baskom's backyard];
>
> "Around April or May 2010, [Roberts] visited Daniel Black in Littlerock, California;[6]
>
> "Around May 2010, [Roberts] called Arthur Turner[.]"

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6 The prosecutor subpoenaed Black as a witness, but Black did not testify.

B

Evans contends we must reverse his convictions because they are all based on a legally impossible conspiracy theory. He supports his contention with the following logic: (1) the charges against him were based on his role as Roberts's coconspirator in a conspiracy to commit an unlawful taking of a vehicle; (2) "it must be assumed" the theft of the excavator alleged in count 5 was the object of the conspiracy because it was the only piece of equipment identified in the overt acts for conspiracy charge; however, (3) the theft of the excavator could not legally have been the object of the conspiracy because, as the trial court found when it dismissed count 5, an excavator is not a vehicle and its theft does not constitute an unlawful taking of a vehicle.

We disagree with Evans's contention that "it must be assumed" the theft of the excavator was the object of the conspiracy. Evans does not cite any authority requiring this mandatory assumption and, on this record, we do not believe any reasonable juror would have interpreted the instructions in this manner. (*People v. Homick* (2012) 55 Cal.4th 816, 895.)

Before the trial court instructed the jury on the conspiracy charge, the trial court instructed the jury it no longer needed to decide counts 3 and 5. Consequently, when the trial court instructed the jury on the conspiracy charge, the jury knew count 1 was the only charge of unlawfully taking a vehicle before it.

Moreover, the trial court's conspiracy instruction informed the jury, "To decide whether the defendant and one or more of the other alleged members of the conspiracy intended to commit the crime of unlawfully taking a vehicle, please refer to the separate

instructions that I have given you on that crime." The separate instructions explicitly applied only to count 1 and defined a vehicle for purposes of that crime as including "a truck, tractor and trailer." The separate instructions made no mention of the excavator.

Further, during his closing argument, the prosecutor advised the jury that count 1 referred to the theft of Mattos's "combination truck and trailer" and the verdict form for count 1 indicated count 1 applied to the charge of unlawfully taking the truck. Accordingly, the only reasonable interpretation of the instructions is that the object of the conspiracy was the unlawful taking of the truck, not the excavator.

The reference to the excavator in the overt acts does not alter our conclusion. The evidence presented to the jury showed the excavator was taken at the same time as the truck and trailer, which were used to transport it. The excavator was subsequently removed from the truck and trailer and stored in Baskom's yard. The truck and trailer were then moved and stored somewhere else. Considered in this context and in light of the trial court's other instructions on the matter, the reference to the removal of the excavator from the back of the truck and trailer would not have prompted a reasonable jury to believe the excavator, rather than the truck, was the object of the conspiracy. Rather, the reference would have prompted a reasonable jury to consider, as the instruction directs, whether Roberts's removal of the excavator from the back of the truck and trailer before he moved the truck and trailer and stored them elsewhere was a step in furtherance of the conspiracy to steal the truck and trailer.

C

Postcrime Overt Acts

Evans alternatively contends we must reverse all of his convictions because his conspiracy conviction may have been based on overt acts occurring after completion of the theft of the truck and trailer. We also disagree with this contention.

Evans correctly contends "the overt act requirement may not be satisfied by conduct occurring after the target offense is complete." (*People v. Jurado* (2006) 38 Cal.4th 72, 122; citing *People v. Zamora* (1976) 18 Cal.3d 538, 560; see also *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368.) However, by not challenging the timing of the first, second, and fourth alleged overt acts, Evans implicitly acknowledges these overt acts preceded the theft of the truck and trailer. As the People point out, defense counsel conceded at trial the first alleged overt act occurred. A "valid finding of a single overt act is sufficient to support the conspiracy verdict." (*People v. Jurado*, *supra*, at p. 122.) Therefore, Evans was not prejudiced by the jury's consideration of any potentially invalid postoffense overt act allegations. (*Ibid.*)

III

Theft of Excavator as a Natural and Probable Consequence

A

Evans contends we must reverse his count 1 unlawful taking of a vehicle conviction because the theft of the truck and trailer was not a natural and probable consequence of the conspiracy to steal the excavator. As we have rejected Evans's

contention that the theft of the excavator was the object of the conspiracy in part II, *ante*, we must necessarily reject this contention as well.

B

Evans alternatively contends we must reverse his conviction in count 7 for the grand theft of the excavator because the theft of the excavator was not a natural and probable consequence of the theft of the truck and trailer. We conclude there is no merit to this contention.

"[E]ach member of a conspiracy is criminally responsible for the acts of fellow conspirators committed in furtherance of, and which follow as a natural and probable consequence of, the conspiracy, even though such acts were not intended by the conspirators as a part of their common unlawful design." (*People v. Zielesch* (2009) 179 Cal.App.4th 731, 739.) "Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' " (*People v. Medina* (2009) 46 Cal.4th 913, 920.) " '[T]o be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough." ' " (*Ibid.*) "Whether the unplanned act was a 'reasonably foreseeable consequence' of the conspiracy must be 'evaluated under all the factual circumstances of the individual case' and 'is a factual issue to be resolved by the jury' [citation], whose determination is conclusive if supported by substantial evidence." (*People v. Zielesch, supra,* at pp. 739-740.)

In this case, substantial evidence supports the jury's implied finding the theft of the excavator was a reasonably foreseeable consequence of the conspiracy to steal the truck and trailer. The excavator was in good condition and had numerous options increasing its value, including the breaker attachment. It was stored at the storage lot, not far from the truck and trailer. Using the trailer to steal the excavator inferably increased the potential reward-to-risk ratio of the theft. Thus, the jury could have reasonably found the theft of the excavator, while perhaps unplanned, was a natural and probable consequence of the theft of the truck and trailer.

IV

Sufficiency of Evidence

Evans contends we must reverse his convictions because there is insufficient evidence he entered into a conspiracy with Roberts to unlawfully take the truck and trailer. When considering a defendant's challenge to the sufficiency of the evidence, " 'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's

findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" [Citation.]' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

Here, the evidence and the reasonable inferences to be drawn from it establish Evans and Roberts spoke on their cell phones on April 7, the same day Roberts visited Evans in Encinitas and drove to the trucking company in a car resembling one Evans rented for Roberts. While at the trucking company, Roberts had an opportunity to observe the trucks, trailers, and excavators parked there. Evans knew the value of this property from his past ownership of similar property. One route from Evans's home to his girlfriend's home passes by the trucking company.

In the late evening on April 11 and early morning on April 12, when the thefts occurred, Evans and Roberts called one another on their cell phones at least 61 times. Between 9:46 p.m. on April 11 and 12:21 a.m. on April 12, Roberts was near the trucking company. By 1:24 p.m. Roberts was in the Pala area. During his interview with Doyle, Evans admitted being in the same area around the same time. There is a route through Pala truck drivers can use to avoid the weigh stations on Interstates 5 and 15. Sometime in April, Roberts stored the excavator and breaker in Baskom's backyard. Sometime in April or May, Evans called Turner and offered to pay Turner $1,000 to drive a truck for him.

Beginning on April 20 Evans began a series of telephone conversations with Mattos in an attempt to persuade Mattos to pay him for information about the whereabouts of the truck and trailer. When Mattos asked for a photograph to prove Evans knew the truck's whereabouts, Evans stated he could not get close enough to get one because there were two pit bulls in the yard with the truck. Evans also mentioned the pit bulls to the officers who arrested him. When the officers finally found the truck and trailer, there were at least two pit bulls at the same location.

During the meeting with the undercover officers who attempted to get Evans to tell them the whereabouts of the truck and trailer, Evans received a phone call from Roberts. After his arrest, Evans lied about knowing Roberts. He later acknowledged knowing Roberts, but denied Roberts was involved in the theft of the truck and trailer.

Evans's extensive communications with Roberts around the time of the thefts, his presence in the Pala area around the same time as Roberts, his attempt to hire Turner to move the truck, his persistent efforts to obtain money from the victims for information about the stolen property, his knowledge of details about the location of the property, including that there were two pit bulls where the truck was being stored, and his lies about knowing Roberts and about Roberts's involvement in the thefts provide ample evidence he conspired with Roberts to steal the truck and trailer. Although much of the evidence involved acts by Evans after the thefts, a defendant's postcrime behavior may be considered in determining whether he had the specific intent to agree or conspire to commit the target offense, as well as the specific intent to commit the elements of the target offense. (See, e.g., *People v. Jurado, supra*, 38 Cal.4th at p. 121.)

Given our conclusion there is sufficient evidence to establish Evans's guilt as a coconspirator, we need not address his related contention there is insufficient evidence to establish his guilt as a direct perpetrator.

V

Aggregate Losses

Evans contends we must reverse the finding under section 12022.6, subdivision (a)(2) and (b), that the victims' aggregate losses exceeded $200,000 because there is insufficient evidence to support the finding. More particularly, he contends the calculation of the victims' losses improperly included one victim's lost income or profits. Instead, he contends the calculation should include only the victims' property losses. We agree the calculation should not include lost income or profits, but conclude there is sufficient evidence to support the jury's finding nonetheless.

Section 12022.6 provides in relevant part: "(a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: [¶] . . . [¶] (2) If the loss exceeds two hundred thousand dollars ($200,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years. [¶] . . . [¶] (b) In any accusatory pleading involving multiple charges of taking, damage, or destruction, the additional terms provided in this section may be imposed if the aggregate losses to the victims from all

felonies exceed the amounts specified in this section and arise from a common scheme or plan."[7]

Resolving Evans's contentions requires us to first construe whether "loss" as used in the statute is limited to property loss or includes other economic losses, such as lost income or profits. "The fundamental task of statutory construction is to ascertain legislative intent so as to effectuate the purpose of the law. [Citation.] When construing statutes, we look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning. [Citation.] Where the language of a statute is clear and unambiguous, we go no further. [Citation.] Only if the statutory language is ambiguous do we consult ' "extrinsic aids," ' such as the objects to be achieved by the statute, its legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which it is a part. [Citations.] In such a situation, we must select the construction that comports most closely with legislative intent, with a view towards promoting rather than defeating the statute's general purposes. [Citation.]" (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611-612.)

The statute does not define "loss," except in the inapposite context of the manufacture and possession for sale of counterfeit computer software or unassembled

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7 Section 12022.6 was enacted in 1976, amended several times, and repealed and reenacted without substantive change effective January 1, 2012. (Stats. 1976, ch. 1139, § 305.5, eff. July 1, 1977 [enactment]; Stats. 2010, ch. 711, § 4, eff. Jan. 1, 2012 [repeal]; Stats. 2010, ch. 711, § 5, eff. Jan. 1, 2012 [reenactment].) Our discussion refers to the current version of the statute as it is identical to the version in effect when Evans committed his crimes.

computer software components. (§ 12022.6, subd. (e).)[8] The reference to "loss" in section 12022.6, subdivision (a)(2), is reasonably interpreted as directly relating to the value of the property taken, damaged, or destroyed. However, the reference to the "losses to the victims" in section 12022.6, subdivision (b), arguably suggests a potentially broader application.

None of the cases cited by the parties assists us in interpreting the statute. In reviewing the legislative history of the statute, we note it was first enacted as part of the Determinate Sentencing Law. (Added by Stats. 1976, ch. 1139, § 273 and as amended by Stats. 1977, ch. 165, § 15.) The major provisions of the law are codified at section 1170 et seq. (*People v. McCart* (1982) 32 Cal.3d 338, 340, fn. 1.) In enacting the law, the legislature stated, "the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (§ 1170, subd. (a)(1); *People v. Hinojosa* (1980) 103 Cal.App.3d 57, 64-

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8 Section 12022.6, subdivision (e), provides: "For the purposes of this section, the term 'loss' has the following meanings: [¶] (1) When counterfeit items of computer software are manufactured or possessed for sale, the 'loss' from the counterfeiting of those items shall be equivalent to the retail price or fair market value of the true items that are counterfeited. [¶] (2) When counterfeited but unassembled components of computer software packages are recovered, including, but not limited to, counterfeited computer diskettes, instruction manuals, or licensing envelopes, the 'loss' from the counterfeiting of those components of computer software packages shall be equivalent to the retail price or fair market value of the number of completed computer software packages that could have been made from those components."

65 ["one of the expressed purposes of the determinate sentencing law is to achieve uniformity in sentencing"].)

In summarizing the application of new section 12022.6 in its then form, a state Assembly Committee stated, "If the victim suffers a *property loss* of between $100,000 and $500,000, then 50% of the [base] term may be added to the sentence. If the loss is over $500,000, then the enhancement may be 100% of the base term." (Assem. Com. on Criminal Justice, Analysis of Sen. Bill No. 42 (1975-1976 Reg. Sess.) as amended April 22, 1976, p. 4, italics added.) Legislative history documents pertaining to 1977 amendments lowering the statute's monetary thresholds to $25,000 and $100,000 also discussed the application of the statute in terms of property loss or value. (See, e.g., Sen. Com. on Judiciary, Analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended June 6, 1977, p. 11; Assem. Off. of Research, Concurrence in Sen. Amends. to Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended June 14, 1977, p. 2; Assem. Com. on Criminal Justice, Report on New Statutes Affecting Criminal Law (1977-1978 Reg. Sess.) p. 15; Legis. Counsel, Rep. on Assem. Bill No. 476 (1977-1978 Reg. Sess.) p. 3; Cal. Dept. of Corrections, Enrolled Bill Rep. on Assem. Bill No. 476 (1977-1978 Reg. Sess.) June 30, 1977, p. 5.) Legislative history documents pertaining to subsequent amendments to the statute, including the last substantive amendments made in 2007, continued to discuss the application of the statute in terms of property loss or property value. (See, e.g., Assem. Off. of Research, 3d reading analysis of Assem. Bill No. 931 (1991-1992 Reg. Sess.) as amended July 1, 1992, p. 2; Legis. Analyst, analysis of Assem. Bill No. 939 (1991-1992 Reg. Sess.) as amended April 29, 1991, p. 41/s4; Off. of Sen.

Floor Analyses, Analysis of Sen. Bill No. 862 (1993-1994 Reg. Sess.) Aug. 14, 1993, p. 3; Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 293 (1997-1998 Reg. Sess.) as amended June 30, 199, p. 1; Assem. Off. of Research, Concurrence in Sen. Amends. to Assem. Bill No. 1705 (2007-2008 Reg. Sess.) as amended July 9, 2007, p. 3; Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1705 (2007-2008 Reg. Sess.) as amended July 9, 2007, pp. 1, 4.)

We are compelled to conclude from these documents, the legislature intended "loss" in section 12022.6 subdivisions (a)(2) and (b), to mean the value of the property taken, damaged, or destroyed, and not to include other types economic losses suffered by the victim. Such an interpretation is compatible with the determinate sentencing law's overarching goal of achieving uniformity in sentencing as it allows sentencing decisions to be based on comparable criteria. Were the application of the statute to depend on the unique economic effect of a crime on a particular victim, criminals who commit similar crimes under similar circumstances could receive substantially different sentences. Accordingly, we conclude Mattos's lost income and profits may not be considered in determining whether the statute applies in this case.[9]

Even without the inclusion of Mattos's lost income and profits, however, there is sufficient evidence in the record, viewed in the light most favorable to the judgment, to establish the victims' aggregate property losses exceeded $200,000. Using the most favorable figures presented to the jury, the damage to the trucking company's fence was

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9 Our conclusion does not affect whether and in what amount Evans may owe Mattos under victim restitute statutes.

$2,000, the stolen truck was worth $70,000, the stolen trailer was worth $75,000, and the stolen excavator without the attached breaker was worth $50,000. These figures total $197,000.

Although the People's expert did not have an opinion on the value of the breaker attachment, the evidence showed the auction value of the excavator was between $40,000 and $43,000 without the breaker. Dixon offered his insurance company $46,000 for both items to account for the value of the breaker above the value of the excavator. The jury could have reasonably inferred from this evidence, the breaker was worth between at least $3,000 and $6,000. Adding the more favorable figure to the existing total brings the victims' aggregate property losses to $203,000, which surpasses the $200,000 threshold required for the statute's application. Therefore, Evans has not established the finding under section 12022.6, subdivision (a)(2) and (b), must be reversed.

DISPOSITION

The judgment is affirmed.

MCCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

MCDONALD, J.